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No. 491

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920.

THE WESTERN UNION TELEGRAPH COMPANY,
Petitioner,

versus

ESTEVE BROTHERS & COMPANY,
Respondent.

Brief for Respondent.

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Montgomery-Andree Printing Co., 307 Chartres St., N. O., La.

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STATEMENT OF THE QUESTIONS OF LAW INVOLVED.

From our point of view, the accurate statement of the vital questions involved in this case is this:

Where a cable company accepts in Havre, France, a cable for transmission to New Orleans, Louisiana, **without limiting its liability in any way,** and makes a negligent error in transmitting the message, thereby causing a loss of

$31,095.00, can the cable company escape liability on the ground that it has filed tariffs in Washington, D. C., providing for the use of forms containing a limitation of liability where *(a)* there is no law requiring the filing of tariffs by a cable, telegraph or telephone company, *(b)* the tariffs, as filed in Washington, and the forms accompanying the same, applied only to telegrams and to cables sent **from** this country and not to cables received abroad, and *(c)* the only reference in the tariffs, as filed, to any limitation of liability was by the provision for the use of certain forms for the sending of messages containing a limitation of liability, but **no such forms were, in fact, used.**

Is the public put on notice of tariffs not required by law to be filed?

Does the general rule that one is not charged with constructive notice by the recordation of instruments for the recordation of which the law makes no provision, specially fail in application to telegraph companies?

Must one sending a telegram without any limitation of liability make fresh inquiry daily to ascertain whether or not the particular telegraph company by which he sends the message has seen fit to file a tariff providing for limitation of liability not actually expressed or known and to which no attention is called? If the sender is told on May 1st, 1916, that the telegraph company has filed no tariffs, is he put on notice on May 2nd, 1916, that the company has elected to file tariffs?

Where no limitation of liability is called to the attention of the sender of the cable, or known to him, much less agreed to by him, can a constructive agreement to such limitation of liability be manufactured in its own favor by a telegraph company by its voluntary decision to place a tariff on file in Washington when the law makes no requirement and no provision for such filing, and such filing is not a prerequisite to the establishment of a legal rate?

May a telegraph company determine for itself whether it will file tariffs or not, and may it regulate the rights of the public by its uncontrolled and uncommunicated decision?

Is the contention of the petitioner herein sound, that a telegraph company may make limitations binding on the public by merely adopting them through its Board of Directors, **even without any filing of tariffs** and without communicating or calling them to the attention of the public; and are customers without knowledge of such limitations bound by such *ex parte* and uncommunicated regulations so adopted? (See pp. 23, 30 and 31 of petitioner's brief.)

Where a telegraph company voluntarily elects, independent of any requirement or provision of law, to file tariffs providing that knowledge of a limitation of liability shall be brought home to customers by the use of forms containing an express limitation in cases of cables sent in this country, will a limitation of liability be created in favor of the telegraph company in case of a cable received abroad where the forms so provided for are, in fact, not used and

no knowledge of the limitation of liability is brought home to the sender?

These are the questions which the defendant telegraph company, petitioner here, asks this Court to decide in the affirmative.

SUMMARY OF FACTS.

Plaintiffs, on September 13th, 1917, sent from Barcelona, Spain, a telegram addressed to Esteve Brothers, in New Orleans, **not in cipher, but in plain English,** directing the sale of two hundred bales of future cotton. The words "two hundred" were written out in letters and were not in figures. By negligence on the part of the employees of the defendant company, the message was delivered reading "two thousand" instead of "two hundred" bales. The resultant loss was $31,095. (Agreed Statement of Facts, Tr., p. 29.)

There was no clause limiting liability in the form upon which the message was sent.

A telegraph company is admittedly not required, either by law or by any regulations of the Interstate Commerce Commission, to file its tariffs. The Interstate Commerce Act, prior to 1910, did not contain any provisions whatsoever applying to telegraph or telephone companies. In 1910 it was amended (Act of June 18th, 1910, c. 309, Sec. 7, 36 Stat. 544) and certain special provisions of the Act were extended to such companies. Many of the provisions applying to carriers were not, however, so extended, among them

the provisions as to the filing of tariffs, which were not made applicable to such companies.

The Western Union Telegraph Company did not file any tariffs until May 2nd, 1916, six years after the amendment of 1910. Its directors then apparently decided that it would be to the interest of the company to voluntarily place its tariffs on file, and voted so to do. **It does not appear that since May 2nd, 1916, the Telegraph Company has kept any tariffs on file at its offices open to public inspection and conspicuously posted** (as carriers are required to do). Other telegraph companies and telephone companies generally are not shown ever to have filed any tariffs. The tariff which the Western Union elected to file in Washington on May 2nd, 1916, provided for the use of certain forms for the transmission of cable messages from this country, which forms contained an express limitation of liability. Those forms were not adopted or prescribed for use in connection with cables not sent by the Western Union in this country, but received by it abroad. Those forms were not used in this case.

There was no clause in any way limiting liability in the form upon which the telegram was sent. It is not claimed that there was any contract or agreement in fact by which the defendant's liability was limited in consideration of the message not being repeated. There was in fact no reference at any time to repetition of the message, and it is not contended or shown that the plaintiff's attention was ever

directed to the possibility of repeating messages at an increased rate, or to the defendant's schedule of rates.

The case, is, therefore, radically distinguished from *Primrose v. Western Union Telegraph Company, 154 U. S. 1,* and the cases following that decision, including the late decision of *Postal Telegraph-Cable Company v. Warren Godwin Lumber Company, 251 U. S. 27.* It is likewise radically distinguished from *Adams Express Company v. Croninger, 226 U. S. 491.* **In all of those cases, unlike the present case, there was an express provision in the telegraph blank or bill of lading, signed by the sender of the telegram or the shipper of the goods, expressly agreeing to a limitation of liability or expressly making a representation of value.**

The sole question raised in those cases was the legal validity of an express limitation of liability expressly made and contracted for. In this case, there was no limitation of liability made or agreed to in fact, or even called to the attention of, or known to, the sender.

Notwithstanding, however, the absence in this case of any agreement to limit liability, and the absence of any representation of value, the defendant asks the Court to relieve it of liability for its error, to throw upon the plaintiff the burden of the loss sustained, and to manufacture for defendant's negligent benefit a limitation of liability which did not exist in fact, upon the theory that such a

result can be justified by an extension of the doctrine of *Boston & Maine Railroad Company v. Hooker, 233 U. S. 97.*

That the doctrine of that case cannot apply here will, we think, be demonstrated by the following analysis of that decision in the light of the pre-existing law, and the special grounds upon which it went, coupled with a consideration of the radical difference between the provisions of the law relating to telegraph and telephone companies and those relating to carriers.

The Hooker Case Departed from the Settled General Rule (Denying a Limitation of Liability Without Clearly Expressed Contract Therefor) Only Because of the Peremptory Requirement of the Law Requiring Railroads to File and Post Tariffs and Providing That No Legal Rates Exist Without Such Filing. There Is No Such Requirement of the Law as to Telegraph and Telephone Companies, Whose Rates Are Effective Without Filing.

In *Boston & Maine Railroad Company v. Hooker, 233 U. S. 97*, the Supreme Court held (Mr. Justice Pitney dissenting) that where a **railroad** company had, pursuant to the **requirements** of **law,** and the **requirements** of **regulations** adopted by the Interstate Commerce Commission, filed and published its tariffs in the manner **required by law,** a passenger was put upon notice of limitations and rate provisions contained in the tariffs **required** to be filed by law and regulations, and actually filed; and that where

a baggage check was issued **in the form provided by the tariffs** so filed and published in compliance with law, there was incorporated in such check, by presumption of law, all the conditions and provisions in such tariffs. The decision made new law. (See the dissenting opinion of Mr. Justice Pitney and the comment in *27 Harvard Law Review 737.)* It has always been the admitted Federal rule, reiterated by this Court, that the normal shipment of goods is with liability for the entire actual value of the goods *(Railroad Company v. Fraloff, 100 U. S. 24; The Majestic, 166 U. S. 375);* and that such liability cannot be restricted without the express actual consent of the shipper. Thus, in *The Majestic, 166 U. S. 375* (at *page 384),* the Court said:

> "In New York Central & Hudson River Railroad v. Fraloff, 100 U. S. 24, 27, this Court said: 'It is undoubtedly competent for carriers of passengers, by specific regulations, **distinctly brought to the knowledge of the passenger,** which are reasonable in their character and not inconsistent with any statute or their duties to the public, to protect themselves against liability, as insurers, for baggage exceeding a fixed amount in value, except upon additional compensation, proportioned to the risk."

(The black letters in the above extract are by the Supreme Court itself, and not by us.)

In *Cau v. Texas & Pacific Railway Company, 194 U. S. 427,* the Court said:

> "There can be no limitation of liability without the assent of the shipper."

And in *New Jersey Steam Navigation Company v. Merchant's Bank, 6 How. (U. S.) 344* (at *382*), the Court said:

> "If any implication is to be indulged in from the delivery of the goods under the general notice, it is as strong that the owner intended to insist on his right and the duties of the carrier as it is that he assented to their qualification."

In the *Croninger case (226 U. S. 491)*, and the *Primrose case (154 U. S. 1)*, and all of the cases following those decisions, there was, as we have already pointed out, in each and every case, an express agreement by the shipper, or an express representation of value, which made all of these decisions entirely consistent with the general rule laid down by the Court in the *Fraloff (100 U. S. 224)*, *Majestic (166 U. S. 375)*, *Cau (194 U. S. 427)* and *New Jersey Steam. Navigation (6 How. 344) cases.*

In the *Hooker case (233 U. S. 97)*, the Court for the first time departed from its own earlier statements of the rule governing the rights of shippers as set out in the cases last above referred to. Those earlier statements represented not only the Federal law as declared by the Supreme Court, but the rule recognized by the authoritative courts of last resort of the various States, by all of which it was held that a limitation of a carrier's liability must be expressly agreed to by the shipper and that not even knowledge or notice of limitations established by the carrier would bind the shipper unless it was shown that he had expressly assented thereto.

See *Boston & Maine Railroad Company v. Hooker, 209 Mass. 958, 95 N. E. 946,* where the Supreme Court of Massachusetts thus stated the general rule:

> "The common law rule fixing the rights of the parties is not open to doubt. It is that, respecting the transportation of baggage or merchandise, a common carrier may relieve itself from many of the heavy responsibilities amounting to insurance cast upon it by the law. It may not exonerate itself by regulation or by contract from liability for its own negligence but it may make just and reasonable stipulations in good faith as to the value of the property entrusted to its care and the amount for which it shall respond in case of loss even though occurring through its own negligence. **Such stipulations must be brought home to the knowledge of the shipper either through a formal contract or express or inferable notice under circumstances warranting the assumption of actual assent."** (Black letters throughout this brief are ours, unless specially otherwise noted.)

In *Hutchinson on Carriers, Third Edition, Section 406,* the rule is thus stated:

> **"Mere notice is not sufficient—What constitutes special contract.**—But while the cases admit the power of the carrier to qualify his risk by special contract, it is at the same time denied that he can do so by a mere notice to the bailor, **or by anything less than a special or express contract.** It therefore becomes important to determine what is to be understood by the term special contract in the mean-

ing of these cases, and what is required to be done between the carrier and his employer to create such a special or express contract as the law requires. According to all the English cases on the subject of limitation of liability by notice, a contract sprung from a knowledge of the notice. The theory upon which they all stand is that, if a party, **knowing** his published terms, employs the carrier without objection, a contract according to those terms is implied between the employed and the employer. And as between parties who are not carriers and other persons who deal with them, there can be no question but that this is the law, upon the most obvious principles. But, as has been said, such notice with knowledge of it does not constitute a contract, but is merely evidence from which a jury is bound to imply one as effectual as if it had been expressed. **An express contract cannot, therefore, spring from a notice unless something be done by the party to be affected by it to make it binding upon him.** If, however, there be an express assent to the notice it would be equivalent to an express contract. And this is the sense in which the words are to be taken when it is said that the contract, to avail the carrier, must be special; and the bailor or shipper is considered as assenting to the terms of the notice when he takes a bill of lading or receipt for his goods embodying the notice, which makes it a special contract between himself and the carrier."

In *Ferris v. Minneapolis, etc., Railroad Co., 143 Minn. 90, 173 N. W. 178 (June, 1919)*, the Supreme Court of Minnesota reiterated the rule generally applied and expressly declined to follow the decision in the *Hooker case*. The ship-

ment there was an intrastate one, but the statutes of Minnesota contained the same requirements as to the filing of tariffs and rates for intrastate shipments as the Acts of Congress provide for interstate shipments. The Court declined to follow the *Hooker case* and incidentally pointed out that since the decision in that case, Congress had provided a substantial modification of the law. (See U. S. Compiled Statutes, 1916, Sec. 8604a.)

Other State Courts have likewise refused to follow the Hooker decision in intrastate cases. (See *Mitchell v. Frank Parmellee Co., 209 Illinois Appeals, 428; L. & N. R. Co. v. Rieley, 121 Va. 469, 93 S. E. 574; Shawnee Milling Co. v. Postal Telegraph Cable Company, 101 Kas. 307, 166 Pac. 493.)*

We refer to these cases, of course, merely as emphasizing the harshness of the Hooker decision and the extent to which it has generally been considered to break in upon the fundamentally established general rule. We submit that the Court will not be disposed to extend it to any case which is not necessarily within it. The present case is radically different for this reason:

Railroad companies are required by law and by the regulations of the Interstate Commerce Commission to file and publish tariffs. Telegraph companies are not. An analysis of the *Hooker case* demonstrates the fundamental character of this distinction.

The whole basis of the decision in the *Hooker case* was the point that **railroad** companies are **required,** by law and

by the regulations of the Interstate Commerce Commission, to file and publish tariffs; that **it is the act of filing the tariffs which itself legally establishes the rates;** that as the law **requires** such railroad tariffs to be filed and published, shippers are bound to take notice of the law; that shippers are, therefore, bound to take notice of tariffs filed in pursuance of the law and are bound by all provisions contained in such tariffs. These statements will be borne out by an examination of the opinion in the *Hooker case* as reported in Vol. 233 U. S., pages 97, *et seq.*

At page 107, in stating the facts as found in the Court below, the Court said:

> "The Court further found that previous to and during September, 1908, the defendant had published and kept open for inspection and filed with the Interstate Commerce Commission, **in accordance with the Act of Congress** relating to interstate commerce and amendments thereto **and the orders and regulations of the Commission,** schedules giving the rates, fares and charges for transportation between different points, including Boston and Sunapee Lake Station, all terminal, storage and other charges required by the Commission, all privileges and facilities granted or allowed, and all rules or regulations which in any way affected or determined such rates, fares and charges or the value of the **service rendered to passengers;** that during the same time, **in accordance with an order of the Commission** of June 2, 1908, making comprehensive regulations as to rate and fare schedules, **the defendant had placed with its agent** in Boston all rate and fare

schedules and the terminal and other charges applicable to that station, and had enabled and required him **to keep in accessible form a file** of such schedules, and had instructed him to give **information** contained therein to all seeking it **and to afford to inquirers opportunity to examine the schedules,** and that the defendant in the manner shown and in all other ways conformed to the acts of Congress and the orders and regulations of the Commission with reference to such schedules."

At page 108, the Court said:

"That **notices were posted at or near the offices** where passengers' tickets were sold in the Boston station, **stating that tariffs naming the rates on interstate traffic were on file with the agent** and would be furnished for inspection upon application and that notices were **posted in the baggage room** of that station, **in a conspicuous place** and in sight of persons using the room for checking baggage, reading that personal baggage not exceeding $100 in value would be checked free for each passenger on presentation of a first class ticket and containing information with reference to excess weight."

At page 113, in discussing the case, the Court said:

"It follows, therefore, from the previous decisions in this Court, that if it be found that the limitation of liability for baggage is **required** to be filed in the carrier's tariffs, the plaintiff was bound by such limitation. Having the notice which follows from the filed and published regulations, **as required by the**

> **statute and the order of the Interstate Commerce Commission,** she might have declared the value of her luggage, paid the excess tariff rate and thus secured the liability of the carrier to the full amount of the value of her baggage, or she might, for the purpose of transportation, have valued it at $100 and received free transportation and liability to that extent only, or, as she did, she might have made no valuation of her baggage, in which event the rate and the corresponding liability would have automatically attached."

At page 114, the Court quoted, in support of its conclusion, the provisions of Section 6 of the Interstate Commerce Act, as amended by the Hepburn Act on June 29, 1906. **It is admitted** (as we point out more elaborately hereinafter) that this section does not apply to telegraph companies and that they are not required to file tariffs thereunder.

At page 115, in discussing the application of Section 6 to railroad companies, the Court said:

> "It is to be observed that the schedules are **required** to state, among other things, in naming certain charges, 'all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares and charges, or the value of the service rendered to the passenger, shipper or consignee.' The question, then, is, did the limitation as to liability for baggage based upon the requirement to declare its value when more than

> $100 was to be recovered, come within that provision?"

At page 117, the Court said:

> "Turning to the act itself, we think the conclusion that **this limitation is a regulation required to be filed by the act** is strengthened by Section 22, which provides: '* * * But before any common carrier subject to the provisions of this act shall issue any such joint interchangeable mileage tickets with special privileges, as aforesaid, it **shall** file with the Interstate Commerce Commission copies of the joint tariffs of rates, fares, or charges on which such joint interchangeable mileage tickets are to be based, **together with specifications of the amount of free baggage permitted to be carried under such tickets, in the same manner as common carriers are required to do with regard to other joint rates by Sec. 6 of this act.'** This section would indicate that Congress thought that paragraph 6 of the act had to do with specifications of the amount of baggage which would be carried free and that **such regulations should be filed under the requirement of paragraph 6** to which it referred."

Section 22, thus referred to, has no application to telegraph companies.

At pages 118, et seq., the Court discussed at length the regulations of the Interstate Commerce Commission **requiring** the filing of passenger schedules. In the present case, it is admitted that the Interstate Commerce Commis-

sion has made no regulations requiring the filing of any tariffs by telegraph companies. (See Transcript, p. 26):

> **"It is further admitted that there is no rule or regulation adopted by the Interstate Commerce Commission requiring the filing of any tariffs, schedules, blanks or forms of telegraph or cable companies."**

At page 120 the Court stated its conclusion:

> "But the effect of the regulations, filed **as required,** giving notice of rates based upon value when the baggage to be transported was of a higher value than $100, and the delivery and acceptance of the baggage without declaration of value or notice to the carrier of such higher value, charges the carrier with liability to the extent of $100 only."

A consideration of this language leaves, we submit, no room for doubt that the entire basis for the Hooker decision was the fact that Section 6 of the Interstate Commerce Act, and the regulations of the Commission thereunder, **required** the filing of tariffs by railroad companies containing a detailed statement of any rules or regulations which in any wise affected rates. The law, by Section 6, requires railroad companies to file tariffs and rates. The law also requires railroad companies to comply with the regulations of the Interstate Commerce Commission. The regulations of the Interstate Commerce Commission require railroad companies to file detailed statements of all rules or regulations which affect rates or the value of services

rendered. All these are requirements of the law. The law, therefore, makes it **mandatory** for limitations of liability which affect rates to be filed in Washington and published. As the law makes these requirements, shippers are bound to know the law. They are put upon notice of the fact that tariffs and rates embodying limitations are filed in Washington and are published, open to public inspection. They are, therefore, bound to inquire as to what are the provisions of tariffs or schedules so filed and published, and they are held to a knowledge of the contents of those tariffs and schedules and to a consent thereto.

This is the reasoning of the *Hooker case*. It is, upon its face, inapplicable to telegraph companies which are not required by law to file or publish tariffs and whose rates are not necessarily legally dependent upon the filing of such tariffs, as are the rates of railroad companies.

Stating the result in other language:

The *Hooker case* holds that a limitation of liability is a part of a rate of a railroad company; that rates of railroad companies can be legally established and made effective only by the filing of a tariff with the Interstate Commerce Commission, and its publication; that once a rate is established by such filing and such publication, it has the force of law and binds the shipper, who is bound to take notice thereof.

But telegraph companies are not required by law to file or publish rates. They may make rates effective without

filing or publishing tariffs. The tariffs of telegraph companies, and the rates therein, have, therefore, not the force of law. Provisions therein contained as to the limitation of liability have equally not the force of law; and they are not binding upon a shipper who has not assented to them and who, in fact, has no actual notice or knowledge of them but has never heard of them.

If it were necessary to find any further evidence than the evidence contained in the opinion itself, that the *Hooker case* is based upon the fact that railroad tariffs (unlike telegraph tariffs) are required by law and regulations to be filed and published, and that rules and regulations affecting rates included in such tariffs have, therefore, the force of law, such evidence is to be found in the language of Section 6 of the Interstate Commerce Act and in the decisions preceding the *Hooker case* which construed that section.

Section 6 of the Commerce Act, which is the section requiring the filing of tariffs by railroad companies, was not amended in 1910. Upon its face, that section applies only to carriers of persons and property. Thus, the section provides that every carrier **shall** file and publish schedules showing the rates "for **transportation**" between different points on its own route and between points on its own route and points on the route of "any other carrier **by railroad, by pipe line or by water** * * *." The section further requires that the tariffs shall state "the places between which **property and passengers** shall be carried",

and that they shall also state "any rules or regulations which in any wise change, affect or determine any part or the aggregate of such aforesaid rates, fares and charges or the value of the service rendered to the **passenger, shipper or consignee.**"

It is the language last quoted which was particularly relied upon by the Court in the *Hooker case*, on the ground that the limitation of liability there affected the rate and charge and the value of the service rendered to the passenger, and therefore **was required** to be filed. This language is, of course, clearly inapplicable to telegraph companies.

Further provisions of Section 6 require tariffs to be posted "in every depot, station or office of such carrier where **passengers or freight,** respectively, are received for transportation."

The section further provides:

> "No carrier, unless otherwise provided by this act, shall engage or participate in the transportation **of passengers or property,** as defined in this act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation **for such transportation of passengers or property,** or for any service in connection therewith between the points named in such tariffs than the rates, fares and charges which are specified in the

> tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the **transportation of passengers or property**, except such as are specified in such tariffs. * * *."

There is no such prohibition applying to telegraph companies or the transmission of messages.

In *Texas & Pacific Railway v. Abilene Cotton Oil Company, 204 U. S. 426* (at *437*), the Court, speaking of the Interstate Commerce Act as applied to railroad companies, said:

> "The act made it the duty of carriers subject to its provisions to charge only just and reasonable rates. To that end the duty was imposed of establishing and publishing schedules of such rates. It forbade all unjust preferences and discriminations, **made it unlawful to depart from the rates** in the established schedules until the same were changed as authorized by the act, and such departure was made an offense punishable by fine or imprisonment, or both, and the prohibitions of the act and the punishments which it imposed were directed not only against carriers but against shippers, or any person who, directly or indirectly, by any machination or device in any manner whatsoever, accomplished the result of producing the wrongful discriminations or preferences which the act forbade. **It was made the duty of carriers** subject to the Act **to file** with the Interstate Commerce Commission created

> by that Act copies of established schedules, and power was conferred upon that body to provide as to the form of the schedules, and penalties were imposed for not establishing and filing the required schedules."

But there is no requirement that telegraph companies should file and publish schedules, and there is no penalty imposed upon them for not establishing and filing such schedules.

At *page 439 of the Abilene case (204 U. S.)*, the Court said:

> "And it is apparent that the means by which these great purposes were to be accomplished was the placing upon all carriers **the positive duty** to establish schedules of reasonable rates which should have a uniform application to all **and which should not be departed from** so long as the established schedule remained unaltered in the manner provided by law. *Cincinnati, New Orleans & Texas Pacific Ry. Co. v. Interstate Commerce Commission, 162 U. S. 164; Interstate Commerce Commission v. Cincinnati, New Orleans & Texas Ry. Co., 167 U. S. 479.*"

But no positive duty has ever been placed upon telegraph companies to establish schedules of rates, or, having established such schedules, not to depart therefrom except in a particular manner. Telegraph companies are not required to file tariffs; and if they do voluntarily file them **they may change them or depart therefrom** without filing the changes **and incur no penalty for so doing.**

In *United States v. Miller, 223 U. S. 599* (at *602*), the Court, again speaking of the application of the Interstate Commerce Act to railroad companies, said:

> "That the act imposes upon common carriers subject to its provisions **the duty of establishing in a prescribed mode** the rates, whether individual or joint, to be charged for the transportation in interstate commerce of property over their lines, and that **the rates so established are obligatory alike upon carrier and shipper, and must be strictly observed** by both until changed in the mode prescribed, are propositions which are not only plainly stated in the act, but settled by repeated decisions of this Court."

In *Texas & Pacific Railway v. Cisco Oil Mill, 204 U. S. 449*, the Court said (at *p. 452*):

> "While Section 6 forbade an increase or reduction of rates, etc., 'which have been established and published as aforesaid', otherwise than as provided in the section, we think the publication referred to was **that which caused the rates to become operative.**"

But rates of telegraph companies are not established by the filing of tariffs. They are effective without filing.

See, also, *Kansas City Southern Railway Company v. Carl, 227 U. S. 469; Missouri K. & T. R. Company v. Harriman, 227 U. S. 657; Chicago R. I. & P. Ry. Co. v. Cramer, 232 U. S. 490*, all of which proceed upon the principle that a rate required by law to be published becomes a part of the law,

and agreements as to value, etc., become themselves part of the rate thus made part of the law.

These decisions all further demonstrate the correctness of our analysis of the *Hooker case* as hinging upon the fact that the tariffs of railroad companies are required by law (and by regulations of the Interstate Commerce Commission having the force of law) to be filed and published, and that when so filed and published, they have themselves the force of law and may not be departed from. None of this is applicable to telegraph companies.

Under the Interstate Commerce Act, as Amended, Telegraph Companies Need Not File or Post Tariffs and Their Rates Are Effective Without Filing.

Prior to 1910, the Interstate Commerce Act did not apply in any respect to telegraph, telephone or cable companies. By act approved June 18th, 1910, c. 309, Sec. 7, 36 Stat. 544, Sections 1, 3, 15 and 20 of the act were so amended as to make certain provisions thereof apply to such companies. There were in all at that time twenty-four sections of the Interstate Commerce Act, and none of the remaining ones were extended in any particular to telephone, telegraph or cable companies. Shortly after the adoption of the 1910 amendment, the Interstate Commerce Commission had occasion to consider the extent to which the act, as amended, applied to such companies and made an official report to Congress embodying its conclusion. See 25th Annual Report of Interstate Commerce Commission (1911), where the

Commission said, at pages 5 and 6 (see Record, pages 16, 36):

> "Section 1 of the act, as amended June 18, 1910, provides that the act shall apply to telephone, telegraph and cable companies, whether wire or wireless. Numerous questions were asked informally as to the instances in which and the extent to which the provisions of the act applied to such companies. In December, 1910, the Commission heard arguments upon certain of such questions, and in March, 1911, expressed its views as to what telegraph and telephone companies are subject to the provisions of the act and the nature and character of services which would render a telegraph or telephone company subject thereto. It was there said that such companies are subject to the provisions of sections 1, 3, 15 and 20 of the act in so far as the terms thereof appropriately apply to such companies.
>
> "Section 6 of the act requires each carrier to print, file and post schedules of its rates, fares and charges 'for transportation between different points on its own route and points on the route of any other carrier by railroad, by pipe-line, or by water, when a through route and joint rate have been established,' and provides that 'the schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried * * * and shall also state separately all terminal charges * * *which in any wise change, affect, or determine any part of the aggregate * * * charges or the value of the service rendered to the passenger, shipper, or

consignee.' It requires that such schedules shall be printed and copies thereof posted 'in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation.'

"There appears to be no requirement for publication, filing and posting of the schedules of charges for the transmission of telegraph, telephone or cable messages between different places on the same route or line or from a place on one route or line to a place on another route or line.

"The foundation of efficient regulation, both as to the reasonableness of rates and undue discrimination, rests in lawfully established charges, and it would seem that such lawfully established charges should be contained in **officially** filed schedules, which **would** be binding upon the telephone, telegraph and cable companies and those for whom such companies perform service.

"The **prohibitions and penalties of** Section 1 of the Act of February 19, 1913, commonly called the Elkins Act, are founded upon lawfully published and filed tariffs and **would seem not to apply in the absence of such lawfully published and filed tariffs.**

"It is thought, therefore, that telephone, telegraph and cable companies should be required to publish, file and post tariffs of schedules of their charges for interstate business. There are thousands of small independent telephone companies whose business is

intrastate, except in occasional instances where their lines are used in connection with the lines of other companies for interstate messages. The Bell Telephone System has, as we are informed, more than five million central and pay telephone stations. It would probably be unreasonable and unnecessary to require that full schedules of charges should be posted in every telephone booth or in every branch telegraph office. All rates for interstate business should, however, be filed with the Commission **and be so posted as to afford interested users or patrons opportunity to ascertain the lawful charge for a given service.**

"Section 6 of the act authorizes the Commission to modify the requirements of the section with respect to publishing, posting and filing of tariffs, and presumably that authority would extend to the tariffs of telephone and telegraph and cable companies, if there were a general requirement for them to publish, file and post same.

"We **recommend,** therefore, that Section 6 of the act **be amended** so as to **require** telephone, telegraph and cable companies to publish, file and post schedules of their interstate charges in such manner and to such extent as may be required by the Commission.

"In this connection attention is called to the apparent **necessity for changes in the Elkins Act** in order to make it clearly applicable to telephone, telegraph and cable companies."

It is to be particularly noted that the above remarks were contained **in an official report by the Interstate Commerce Commission to Congress;** that the Commission therein recommended to Congress the passage of amendatory legislation by which telegraph companies would be required to file their tariffs; and that **no such legislation has ever been enacted by Congress,** which saw fit to leave the law as noted in the Commission's report. It would hardly be a violent presumption to suppose that the telegraph companies themselves were not anxious to have the law amended. If they had desired such an amendment, it would doubtless have been had, as it is hardly likely that anyone else would have objected to telegraph companies being required to file tariffs.

Even in 1920, when the Interstate Commerce Act was extensively amended by the Transportation Act and some of the other provisions of the act were extended to telegraph, telephone and cable companies, **no requirement was made that such companies should file and post tariffs,** or that their rates should not be legally effective until posted and filed. Compare Act of February 28th, 1920 (41 Stat. at L. 456.)

In the *Unrepeated Message Case, 44 I. C. C. 674,* upon which the defendant relies, the Commission said:

> **"So far as the specific requirements of Section 6 are concerned, the rates, charges, rules and regulations of telephone and telegraph companies may be and customarily are, established and offered to the public without first being published and posted**

> **with the Commission, a procedure that must be observed by all other carriers under our jurisdiction before they may lawfully offer their services to the public or legally affect changes in their rates and practices."**

The correctness of the Commission's construction of the law is **admitted by the defendant Telegraph Company.** See page 30 of their brief in this Court, where they say:

> "* * * In the case of telegraph companies, Congress has concluded that it is permissible for the carrier to put rates into effect without their previous filing with the Commission and without their publication at stations, as is also the same with respect to its regulations and classifications of messages and the rates therefor."

See also page 37 of the brief of the plaintiff in error, where counsel say:

> **"Knowing all these things, Congress evidently refrained from requiring telegraph companies to adopt the stringent rules which had been laid down respecting filing tariffs or regulations with the Interstate Commerce Commission, or making provision for filing them at offices of the telegraph companies."**

Telegraph Companies, Unlike Railroad Companies, Are Not Subject to Penalties for Departing from Tariffs, or for Discrimination.

Another important distinction between telegraph and telephone companies, on the one hand, and railroad com-

panies on the other, is that while railroad companies are subject to penalties for departing from published rates, telegraph companies are not.

Paragraph 6 of the Interstate Commerce Act prohibits carriers of passengers or property from departing from established rates. These provisions, as already shown, do not apply to telegraph or telephone companies. Further, no provision of the Interstate Commerce Act, as amended in 1910, provided any penalty for discrimination by telegraph companies. The section of the act establishing and defining the offense of unjust discrimination (Section 2) applies by its terms only to the transportation of passengers or property. Section 10, which establishes a penalty for unlawful discrimination, also in terms applies only to transportation of persons and property.

It was not until the passage of the recent Transportation Act of 1920, approved February 28th, 1920 (more than two and a half years after the transaction upon which this suit is based) that Sections 2 and 10 of the Interstate Commerce Act were amended by introducing the words "transmission of intelligence", so as to establish the offense of unlawful discrimination in the business of telegraph companies and so as to make them subject to the same penalties as theretofore provided for railroad companies. See Transportation Act of 1920, Sections 404, 414.

While Section 6 of the Interstate Commerce Act was further amended by Congress in 1912, by the Act of August

24th, 1912, Chapter 390, Section 11 (4 Federal Statutes Annotated, 426; U. S. Compiled Statutes 1916, Section 8567), Congress did not include in the amendment any provision requiring telegraph companies to file tariffs or prohibiting them from departing from tariffs once filed.

By the Transportation Act of 1920, approved February 28th, 1920, Sections 409, 410, 411, Congress again amended Section 6 of the Interstate Commerce Act, but again deliberately abstained from including in the amendment any provision requiring telegraph companies to file tariffs, or prohibiting any departure by them from tariffs once filed. This deliberate abstention on the part of Congress is the more significant because of the care which Congress took to amend Sections 2 and 10 of the Interstate Commerce Act, so as to make them applicable to telegraph companies. See Sections 404 and 414 of the Transportation Act of 1920 above referred to. In 1920 Congress thus deliberately emphasized its intention that telegraph companies should be for the first time made subject to certain provisions of the Interstate Commerce Act, to which they had not been subject prior to 1920, but that they should still not be included in the provisions requiring the filing of tariffs and prohibiting departures from tariffs, but should continue free to file tariffs or not as they saw fit, and to make such changes in their tariffs and rates as they might elect.

The defendant telegraph company cannot, therefore, possibly contend that the Act to Regulate Commerce, as it

existed at the time of the sending of the message involved in this case (or, indeed, even as it exists today) has, or was intended to have, anything like the comprehensive application to telegraph companies that it has to railroads and carriers of persons and property.

As pointed out by the Interstate Commerce Commission in its 1911 report to Congress, above quoted, the Elkins Act (32 Stat. L. 847), forbidding rebates, etc., does not apply to telegraph companies. Notwithstanding the recommendation of the Commission, Congress has not seen fit to amend the Act so as to make it apply to telegraph companies.

Where the Law Does Not Require the Filing or Posting of Tariffs, the Public Is Not Put on Notice by the Voluntary and Uncontrolled Election of One Telegraph Company to File Tariffs.

It is settled law that the recordation of an instrument not required to be recorded does not operate to give notice. See *35 Cyclopedia of Law and Procedure, 350:*

> "If the instrument affecting the title of the seller is duly filed and recorded, the record is constructive notice to the purchaser, provided it is filed in the proper office, and if recorded within the time prescribed by the statute, it is constructive notice even to purchasers between the date of execution and the date of registration. **If, however, such an instrument is not required to be recorded, the record thereof will not constitute constructive notice.**"

In *20 Ruling Case Law, page 355*, the rule is thus stated:

> "Aside from the record of instruments provided for by such Acts, it may be said that the mere filing or recording of an instrument in a public office does not constitute notice to the public. * * *"

Glenn v. Davis, 25 Maryland, 208:

> "Where a paper is not entitled by law to be recorded, placing it upon record does not operate as constructive notice."

Janelle v. Denoncour, 68 New Hampshire 1, 44 Atlantic 63:

> "The bill of sale not being an instrument required by law to be recorded, a record of it is not notice of sale to the creditors of a vendor."

Williams v. Logan, 32 Georgia 165:

> "The registration of such conveyances only as are required by law to be registered is constructive notice to subsequent purchasers."

Morel v. Houstoun, R. M. Charlt. (Georgia), 284:

> "A deed of personal property made in 1795 does not require to be recorded, and, if recorded, is not notice to subsequent purchasers. **Such persons may safely assume that there is nothing on the records** which could affect their rights."

See also

Mueller v. Engeln, 75 Ky. (12 Bush.) 441.
Braxton v. Bell, 92 Virginia 229, 23 S. E. 298.
Rauh v. Morris, 40 Okla. 288, 137 Pac. 1174.
Pitcher v. Barrows, 17 Pick. (Mass.) 36.

The rule thus laid down has had the specific approval of this Court. See *Burck v. Taylor, 152 U. S. 634,* holding:

> "That the filing of an instrument for record in a public office of the State, for the record of which the statutes of the State made no provision, carried with it no notice to other parties."

The rule thus supported by authority is also the only one consistent with reason and justice. If an instrument is not required to be recorded or filed, it is not necessary for third parties to examine the records. Such persons may safely assume that there is nothing in the records which could affect their rights.

If an instrument not required to be recorded is, in fact, voluntarily filed for record, the rights of third parties cannot be affected. To permit them to be affected would be to give the effect of law to the voluntary act of those seeking to accomplish some special purpose by recordation, by ascribing to the recordation all of the effect which would follow from the requirement of law. In such a situation no one could rely upon the provision of the law itself that the instrument need not be recorded.

Instruments of pledge are not required to be recorded. *(31 Cyclopedia of Law and Procedure, 699,* and cases cited.) Is a third person then bound nevertheless to examine the records? And if he fails to do so, will he be affected by any notice which an examination of the records would have disclosed? It seems to us that these questions answer themselves.

The situation is precisely the same in the present case, where no law required the filing of the defendant's tariffs. The defendant's voluntary and uncontrollable act in filing them cannot affect the plaintiffs here with notice. The rights of the plaintiffs cannot be determined by the voluntary acts of the defendant, not governed by the law and over which the plaintiffs had no power.

In *Boston and Maine Railroad v. Piper, 246 U. S. 439*, the Supreme Court decided that:

> "Illegal conditions and limitations in a carrier's bill of lading do not gain validity from the filing of a form containing them with the Interstate Commerce Commission."

By parity of reasoning, the voluntary, revocable act of the defendant Telegraph Company in filing its tariffs with the Interstate Commerce Commission do not give the provision of those tariffs the effect of law, nor make them binding upon the public as they would be if required by law to be filed and forbidden to be departed from.

The Contention that the Public is Controlled by the Voluntary Filing of Tariffs Would Expose Those Dealing With Telegraph Companies to the Caprice and Whim of the Directors of the Telegraph Companies.

If the directors of a telegraph company see fit to file tariffs with the Commission, then the argument is that the

public must be bound thereby. If the directors see fit not to file such tariffs, they need not do so, and the public is equally bound by their failure to do so.

If the directors of the telegraph company, after having once filed tariffs, see fit to depart from those tariffs and to entirely ignore the same, they may do so with impunity. There is no penalty provided.

It cannot be the law that the rights of the public are controlled by the caprice and arbitrary decision of the directors of telegraph companies.

It cannot be that the purely voluntary act of the directors of telegraph companies is entitled to the same force and effect as the positive and mandatory requirement of the law.

In this very case the statement of facts shows that the defendant telegraph company did not file its tariffs with the Interstate Commerce Commission until 1916 (Tr. p. 18), or six years after the amendment of 1910 to the Interstate Commerce Act. The defendant's directors saw fit not to file tariffs for six years. In 1916 they made up their minds to file tariffs. In 1921, they may make up their minds to withdraw them. At any time they are at liberty to ignore them or to depart therefrom and pay no attention thereto without incurring any of the specific penalties provided for railroad companies.

Can it be seriously argued upon this state of facts that the defendant telegraph company can be free to act en-

tirely as it chooses, to observe or to ignore tariffs which it is not required to file or to maintain; and that the public is entirely at the mercy of the telegraph company and must do as the directors of the telegraph company elect it should?

There is no evidence that other telegraph companies have elected to file their tariffs with the Interstate Commerce Commission. It is admitted that no telegraph company is required to do so. Very probably, the Postal Telegraph Company or other independent lines have filed no tariffs. So far as we are advised, certainly the telephone companies (which are in exactly the same legal situation as the telegraph companies) have filed no tariffs.

Is the Western Union Telegraph Company, then, to be in a class unto itself, distinct and apart from any other telephone or telegraph company?

Is the Western Union Telegraph Company to have a right to put itself in a class to itself according to the revocable whim and desire of its Board of Directors or its Executive Committee?

Is the Western Union Telegraph Company to be permitted to make its own law?

Unless the telegraph company can bind the public by its private regulation without publishing the regulation or calling it to the attention of its customers, how can the telegraph company attain a different result by filing the tariff voluntarily **(after six years of non-filing)** in a place where it is not required to file it?

The defendant here did not see fit to file its tariffs until May 2, 1916. Supposing that the plaintiffs, on May 1, 1910, had, as an extraordinary precaution, inquired at the Interstate Commerce Commission for the tariffs of the defendant company: the plaintiffs would have been advised that no tariffs had been filed. It could not then reasonably be claimed, we submit (notwithstanding the broad language of defendant's brief) that the plaintiffs, in sending a message on May 1, would be controlled by any private regulations of the defendant company, not communicated to them. Suppose, then, that on the next day the defendant company saw fit to file its tariff. How are the plaintiffs to know that the company has done so? Are they required to inquire daily of the Commission as to whether tariffs have been filed?

Suppose other telegraph companies have not filed their tariffs with the Commission. The parties dealing with them cannot be bound by private regulations not printed on the forms actually employed. Must persons dealing with such telegraph companies inquire daily of the Commission to ascertain if the telegraph companies have seen fit to change their practice and to file tariffs containing new regulations not on their forms and not called to the customer's attention?

These are but the more obvious of the logical and practical difficulties which the maintenance of the defendant's theory in this case necessarily involves.

In the *Hooker case*, not only were the tariffs required to be filed, but they were required to be posted in two public and **conspicuous** places and kept **open to public inspection at every depot or office.** See Section 6 of the Interstate Commerce Act, which provides that:

> "Such schedules shall be plainly printed in large type and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected."

In the opinion in the *Hooker case*, the Court emphasized the fact that these provisions were complied with and that the tariffs were kept on file, open to inspection, in accessible form, at the station in Boston, and notice to that effect was posted in the baggage room **in a conspicuous place.** See *233 U. S., at 108*.

There is no showing in this case that the defendant telegraph company, after voluntarily electing to file its tariffs with the Interstate Commerce Commission ever voluntarily elected to comply with the other requirements applicable to carriers, or **ever printed or published its tariffs or kept them open to public inspection.** In the absence of such a showing, certainly none of the grounds which existed in the *Hooker case* for the imputation of notice to the shipper can be said to apply in this case.

The Ex-Parte and Uncommunicated Establishment by a Telegraph Company of a Regulation Limiting Its Liability Cannot Affect Persons Without Notice.

The defendant telegraph company apparently concedes that the voluntary filing of tariffs in Washington would not in itself affix the public with notice or subject the public to limitations of liability; for counsel take the position that, independent of any filing, the public is bound by limitations of liability established by the telegraph company in its regulations without regard to whether such regulations are filed or whether they are in any manner known. See pages 22, 23 and 30 of petitioner's brief. At page 30, counsel say (black letters ours):

> "**When the telegraph company, therefore, by its board of directors, duly enacted the regulations,** as the agreed statement of facts shows it did, and fixed the rates for the different classes of messages, **the rules binding the public were such rules thus enacted** until changed by such company or by order of the Commission; and **it made no difference whether they were known to the public or not;** each class of messages took the rate attaching to that class of messages and the measure of liability as fixed by the regulations for that class."

At pages 23 and 24 counsel say:

> "The principal object of filing the defendant's rates and schedules with the Interstate Commerce Commission was to make it easy for the public to ascertain or for the company to show what the legal

> rate and regulation was on the particular date and with respect to the particular class of service; it **was not because defendant was under any misconception as to the necessity of filing rates or regulations,** or as to the effect of such filing on the question of whether a rate or regulation was legal."

And, again, at page 30, counsel say:

> "But in the case of telegraph companies Congress has concluded that it is **permissible for the carrier to put rates into effect without their previous filing with the Commission and without their publication at stations,** as is also the case with respect to its regulations and classifications of messages and the rates therefor."

Counsel thus contend that it was the intention of Congress that persons dealing with telegraph companies should be bound by conditions of which they have no actual knowledge or notice of any sort, which are not brought home to them in any way, and which the telegraph company may put into effect without either filing with the Commission or any publication at stations.

We submit that such a conclusion is so startlingly inconsistent with the most fundamental considerations of justice that the Court cannot lightly impute to Congress any intention to sanction such a result, much less to require it.

In *Cleveland, C. C. & St. L. Railway Co. v. Hirsch, 204 Federal, 849,* the Circuit Court of Appeals for the Sixth Circuit, said (at p. 853):

> "The object of **requiring** tariffs to be published is not only to impose upon the carrier the duty of

> equality in service and rates, but also to enable shippers to protect themselves in that behalf."

It is one thing to say, as was said in the *Hooker case*, that a shipper is put on notice of provisions in tariffs which could not be made effective without being filed, and which must be not only filed with the Commission, but printed and kept open to public inspection. It is quite another thing to say that customers are put on notice of private regulations made by telegraph companies, which they are not required to file or to publish, and which they are at liberty to change at any time as they see fit.

At page 22 of their brief, counsel say:

> "In the case of carriers of persons and property one of the steps necessary to the establishment of a legal rate or regulation is the filing of the rate or regulation with the Interstate Commerce Commission, and no rate or regulation can become legal or effective until it is filed, simply because the law says it must be filed before it is legal and effective. In the case of the other carriers subject to the same act, namely, telegraph and cable companies, the act does not require the filing of the rate or the regulation, and in the absence of this requirement the regulation is legal and binding **the moment it is fixed and established by the carrier.**"

And, at page 23, counsel say:

> "But **filing does not enter** into the determination of the question whether a telegraphic rate is or is

> not the legal rate; the test in the case of a telegram is, was the rate charged the one **initiated by the telegraph company** prior to the date of the message, and was it, therefore, the regularly established rate?"

But is it not unthinkable that Congress would leave it in the power of telegraph companies to control the rights of the public by private agreements, not communicated to customers, not filed and not published? Taking the last language quoted from counsel literally, it would mean that the defendant company might establish a private regulation limiting its liability, which would bind the public even though such regulation was not published or filed anywhere. The public would then be entirely at the mercy of the private rules of the telegraph company, which it would have absolutely no means of ascertaining.

This extraordinary contention would ignore entirely the emphasis placed in the *Hooker case* and all of the other decisions to which we have referred upon the **requirement** of the law that railroad companies should file tariffs, and upon the provisions of the law forbidding under heavy penalties departures from the rates so filed (none of which requirements or provisions are applicable to telegraph companies). Section 6 was the particular reliance of the Court in the *Hooker case* (see pages *114, 115, et seq., 233 U. S.)* The Court found that Section 6, which required the rates to be filed and forbade departure therefrom, made everything pertaining to the rates part thereof and made it unlawful to deviate from the rate as filed. The Court would

obviously not have reached the same result had there been either no requirement of law that the rate be filed with the Commission or no prohibition of any departure from rates so filed.

All of the other related decisions of this Court are built up upon and about the fundamental proposition that rates are required by law to be filed; that when filed they may not be departed from; and that, for that reason, rates, and all matters affecting rates, become, when published, in effect a part of the law. The filing and publishing of the rate in accordance with law is the **act which establishes** it in the case of railroad companies. *(United States v. Miller, 223 U. S. 602; Texas & Pacific Railway v. Cisco Oil Co., 204 U. S. 449.)* This, as the decisions show, is because the law **requires** the filing and publication of such rate by railroad companies and **forbids** any departure from such rates by railroad companies. **The law makes no such requirement and no such prohibition in the case of telegraph companies.**

The Western Union Telegraph Company's contention on this point reduces itself to the proposition that the *Hooker case* would have been decided just as it was decided even if the Interstate Commerce Act had contained no provisions requiring the filing and posting of tariffs by railroads. This contention appears in the language used by counsel in their brief at pages 29 and 30. Telegraph companies today are, counsel there argue, in the same position as railroad companies, except as to the requirement for the filing and post-

ing of tariffs, which requirement, counsel say, "has no significance or peculiar value with respect to the rates, except as they secure persons dealing with the carriers equal facilities for protection against unreasonable and discriminatory charges." The protection of the public against unreasonable and discriminatory charges appears to us to be rather fundamental. It is fairly accomplished only by making the filing of tariffs compulsory and providing penalties for departures therefrom. It is not fairly accomplished by leaving the public at the mercy of the telegraph companies, as defendant here would leave it.

Counsel's argument is that the *Hooker* decision rests upon the general obligation of carriers not to discriminate, and not at all upon any requirement for the filing and posting of tariffs. But the obligation of carriers not to discriminate exists at common law. (See *Western Union Telegraph Company v. Call Publishing Co., 181 U. S. 92.)* **And if the present contention be sound, then apart from any provisions of the Interstate Commerce Act, a shipper was bound at common law by a limitation of liability not disclosed to him if the carrier could show that it had disclosed such limitations of liability to others similarly situated.** This result could not be reached without reversing all of the earlier decisions of this Court rendered prior to the enactment of the Interstate Commerce Act, as well as all of the decisions of every other Court to which the question has ever been presented.

The Provisions of Section 1 of the Interstate Commerce Act as to Classification of Messages are Permissive Only.

Counsel for the telegraph company argue that the company should escape liability here because Section 1 of the Interstate Commerce Act, as amended in 1910, provides that telegraph companies may classify messages and may charge different rates for the different classes. But the Court will note that the language of the Act is purely permissive (and not mandatory as in the case of carriers), the pertinent language reading as follows (black letters ours):

> "Provided that messages by telegraph, telephone or cable subject to the provisions of this act, **may** be classified into day, night, repeated, unrepeated, letter, commercial, press, government and such other classes as are just and reasonable, and different rates **may** be charged for the different classes of messages."

This amounts to nothing more than a permission to the defendant company to classify its messages by proper agreements. It does not **require** the telegraph companies so to classify them. If it did, the telegraph company might more logically claim that it was illegal for it not to classify them or to enter into any agreement from which non-classification would follow (although it would not even then follow that the innocent plaintiffs should be penalized by an illegal act of defendant—see *infra*). But there is, we repeat, no requirement, and all that the law does is to say

that the telegraph companies may, if they see fit classify their messages and charge different rates for the same. We do not deny that the Telegraph Company **might** have done this by appropriate contract or provision on the cable form in the present case; **but it did not do so.** Nothing in the section referred to relieves the telegraph company of the necessity of bringing its classifications home to the notice of its customers and procuring their assent thereto.

The utmost accomplished by the language in Section 1. relied upon by the telegraph company, is to preclude customers with whom agreements for classification **are actually in fact made** (by appropriate conditions and recitals in the telegraph form or contract for forwarding) from claiming that such agreements are invalid. In many states it is held that such agreements and classifications are in fact invalid and that telegraph companies are liable for unrepeated messages to the same extent as for repeated ones. The effect of the language quoted from the amendment of 1910 to Section 1 of the Interstate Commerce Act, is to shut off this argument so far as interstate messages are concerned where an agreement for such classification is actually made. This is the effect, and the only effect, of the recent decision of this Court in *Postal Telegraph Company v. Godwin, 251 U. S. 27.* In that case, there was an express provision in the contract between the telegraph company and its customer that the liability of the telegraph company was limited if the message was not repeated. By the doctrine of the Courts of Mississippi, where the contract was made, this limitation was invalid. This Court held

that as the message was an interstate one, it was governed by the Federal law, and that the limitation expressly agreed on would be maintained in view of the language of the Interstate Commerce Act and the decision in the *Primrose case (154 U. S. 1)* upholding the validity of such an express agreement **when actually made in fact.** Nothing in this decision affects the present case, where no limitation of liability was ever in fact provided for or agreed to. *Quoad* this case, the telegraph company did not see fit to avail itself of the **permission granted it to contract** for limited liability.

Even If It Were Shown that the Telegraph Company's Failure in This Case to Use Forms Providing for Limitation of Liability Amounted to Discrimination for Which the Telegraph Company Might Be Punished, that Would Not Justify the Penalization of the Innocent Plaintiff.

It is argued that a decision for the plaintiffs in this case will lead to a discrimination in favor of the plaintiffs and against those with whom the telegraph company has seen fit to make contracts for limited liability. As a matter of fact there is no evidence in this record to show that the telegraph company is in fact discriminating between the plaintiffs and other customers **similarly situated.** While the defendant company's domestic telegrams appear to be taken upon forms containing limitations of liability, there is no evidence that it observed such forms in the case of foreign messages received by it abroad for transmission.

It does not appear but that every foreign customer of the defendant company is in the same position as these plaintiffs. If such customers are in the same position, then there is not even an apparent discrimination. This Court could not undertake to say that the telegraph company could not handle foreign messages upon a basis different from that upon which it handles domestic messages. Even if it were true that the defendant company could not fairly establish a different basis, such basis, if in fact in existence, would be legal until properly changed upon proper complaint being made after proper proceedings to that end.

But even if it were conceded that the effect of the contract made by the defendant here, without any limitation of liability, was to discriminate in favor of foreign senders of cablegrams as against domestic senders of telegrams (disregarding differences in the character of the cases and the situation of the parties), it would still not follow that the plaintiffs should be deprived of their right to recover the damages which they have suffered through the defendant's fault.

Why should the innocent plaintiffs be penalized again for the fault of the defendant company? As we have pointed out, it is not shown that the plaintiffs here had their attention called to the fact that the telegraph company was assuming no responsibility for this message. **It is not shown that plaintiffs knew that the telegraph company was making contracts with other customers providing for classification of messages into repeated and unrepeated messages.**

The case is not, therefore, that which would be presented if the plaintiffs had, with knowledge, entered into a contract which they knew to be discriminatory in their favor.

Why, then, should the innocent plaintiffs be penalized, and why should a contract which they never made be imposed upon them, merely because the defendant company (which knew the facts, while the plaintiffs did not) saw fit to make a contract with plaintiffs different from that which it makes with other customers?

Suppose a telegraph company made a contract with A to carry a message for fifty cents. Suppose the same company, then, without A's knowledge, made a contract with B to carry the same message, between the same points, for one dollar. This would be a discrimination in favor of A and against B. But could it be said that the contract with A was null for that reason and that A was not entitled to recover upon his contract for any damages caused to him by its breach? The answer must be, we think, clearly, No. The remedy for the discrimination is not the annulment of the contract or the penalization of A, but the punishment of the telegraph company which has practiced the discrimination. Other senders of messages charged at different rates might recover the excess charges from the defendant *(Western Union Telegraph Co. v. Call Publishing Co., 181 U. S. 92.)* Apart from such recovery, as we have shown *supra*, the law provided no specific penalties for discrimination by telegraph companies, and the defendants were not even subject to that risk.

But if they had been, the plaintiffs' right to recover for their damages would not be lost by the wrongful act of the defendants in discriminating through their failure to make a contract for limitation of liability—a failure to which the plaintiffs were not parties, and in which they did not connive, and for which they could in no manner be held responsible. Plaintiffs could not be affected by illegal conduct on the part of the defendants, in which they did not co-operate. See *13 Corpus Juris, 516, 517:*

> "An agreement is not necessarily illegal because carried out in an illegal way, if this was not contemplated when the agreement was made. Where the contract is illegal for other reasons than that it involves moral turpitude, ignorance of the illegality of the contract on the part of the party seeking relief has been considered as strong ground for granting relief to him."

Ibid., page 517:

> "Where an agreement is lawful on its face, or is capable of being executed in a lawful way, and the intention of one of the parties is that it be so executed, he is entitled to enforce it, notwithstanding the other party intended an illegal act, if the first party was unaware of the illegal intention."

This principle was applied by this Court in a case cited in the opinion of the Circuit Court of Appeals, *Merchants Cotton Press Co. v. N. A. Ins. Co., 151 U. S. 368.* In that case, which arose in November, 1887 (subsequent to the

passage of the Interstate Commerce Act, but prior to the amendments of 1889 to that Act, which introduced the requirements of Section 6 as to the filing and posting of tariffs), cotton was destroyed by fire while in the hands of a railroad company which sought to escape liability on the ground that a rebate had been given to the shippers which was illegal and forbidden under the Interstate Commerce Act. This Court quoted with approval the following language:

> "We are of opinion, however, and rest our decision upon the ground that if it were assumed that the law was applicable, and the fact of agreement for rebate and special rate proven, it would not prevent liability on the part of the carrier for the freight received and covered by insurance in the hands of the carrier's agent. The law makes such agreements as to rebate, etc., void, but does not make the contract of affreightment otherwise void, and we think there is nothing in the law or the policy of it which requires a construction that would excuse a carrier from all liability where it made such a contract in connection with that for receipt and transportation of freight. Such a construction would encourage rather than discourage such unlawful agreements for rebates. The carrier might prefer them to liability for the freight. Such a contract for rebate would be void, and could not be enforced, but we think the shipper could nevertheless recover for loss of his freight through the carrier's and insurer's negligence."

This decision is directly opposed to the telegraph company's attention that the *Hooker case* would have been de-

cided as it was independent of the amendments to the Interstate Commerce Act requiring the filing of tariffs. See also

Gibbs & Sterrett Mfg. Co. v. Bucker, 111 U. S. 597.

Williston on Contracts, Sec. 1631, p. 2868.

We have already called attention to the fact that the Interstate Commerce Act, as amended in 1910, contained no provisions prohibiting telegraph companies from departing from established rates or subjecting them to the definition of unlawful discrimination contained in Section 2, or to the penalties provided in Section 10.

It is true that telegraph companies are subject to regulations by the Interstate Commerce Commission. The Commission may order a telegraph company to change its rates or its regulations.

The Commission may order the defendant telegraph company, in the future, not to handle in this country any messages received from foreign countries without an express limitation of liability. But such future action by the Commission cannot have a retroactive effect and cannot operate to change the facts as they existed at the time the message here involved was accepted by the defendant company. And even as to future cases, if the telegraph company disobeyed such an order of the Commission, and accepted messages from foreign countries without contracting for limitation of liability, the effect would be, not to

impose upon the sender a contract which was not made, but to subject the telegraph company to the penalties (provided only since 1920) for disobedience of the orders of the Commission. So long as telegraph companies are not required by law to file their tariffs, the provisions contained in their tariffs cannot be said to have the force of law or to control the rights of third persons. There are undoubtedly other telegraph and telephone companies which have not filed tariffs with the Commission. The rights of third parties dealing with such companies must be necessarily governed by the agreement made between them and the particular telegraph or telephone company concerned. If any such telegraph or telephone company accepts a message from a customer without a limitation of liability, that customer must have the right to recover the full damages sustained by him through any negligence. It would make no difference as to the right of this customer that the telegraph or telephone company concerned was, in other localities and with other persons, making contracts particularly providing for a limitation of liability. The Commission may order the telegraph or telephone company to discontinue such discrimination; but the rights of the first customer which had already accrued could not be affected by such order. The Western Union Telegraph Company cannot put itself in a different or better position than that occupied by other telephone or telegraph companies by its own voluntary act. It cannot control the rights of innocent third parties to whom it has given no notice, by its own *ex parte* act.

Defendant's Contention Would Not Make for Uniformity. That May Be Accomplished Only by Compelling Defendant to Communicate Its Limitations.

If a customer goes into the office of the Postal or X Company, which has not filed tariffs because not required by law to do so, and there makes a contract, such a contract as is agreed upon between himself and the company, and is not required to make inquiry of the Interstate Commerce Commission, he surely has a similar right with the Western Union Telegraph Company.

If the position of the defendant telegraph company in this case is maintained, it would mean that one dealing with the Western Union Telegraph Company is in a different position from one dealing with some other telephone or telegraph company.

The rights of the Western Union Telegraph Company would be determined by one rule (established by the voluntary and uncontrollable act of the Executive Committee of the Western Union Telegraph Company) while the rights of other telegraph companies and parties dealing with them, would be controlled by a different rule.

Would this promote the uniformity for which the defendant company in this case claims that it is contending? On the contrary, we respectfully submit to the Court that such a result would defy uniformity and set it at naught. It would give one telegraph company the right, at its own ca-

price, to make a rule for itself different from that governing the actions of other companies in the same business. That is unthinkable.

We submit that the true rule, and the rule which Congress intended to accomplish, is this:

Telegraph companies are not required to file tariffs. The rates established by telegraph companies do not require filing to be effective. They may be established by the voluntary act of the telegraph company, and are binding without more. For that very reason customers dealing with them are not put on notice of the provisions of tariffs.

The rights of such customers are, therefore, controlled by the agreements made by them with the telegraph company. The Interstate Commerce Commission may, upon complaint or upon its own motion, order telegraph companies to change their rates or their forms of contract. After such orders are made, disobedience thereof by the telegraph company will expose it to the penalties provided by Section 10 of the law, since the amendment of that section, made in 1920, so as to bring telegraph companies within it. But the rights of customers dealing with the company will continue to be governed by the agreements actually made. If such agreements are contrary to those which the Commission has ordered to be made, the telegraph company will be punished; but the innocent customer cannot be penalized. The punishment of the telegraph company will be an effective means of preventing discriminations; but certainly no order of the Commission

directing telegraph companies to change the forms of their agreement can affect the rights of customers which attached before such changes were made or before they were ordered.

The Decision in *Shawnee Milling Co. v. Postal Telegraph-Cable Co. (101 Kans. 307)* Rests Upon Kansas Statutes Requiring the Filing of Tariffs by Telegraph Companies.

At page 32 of the petitioning telegraph company's brief in this Court, reference is made to the decision of the Supreme Court of Kansas in *Shawnee Milling Company v. Postal Telegraph-Cable Co., 101 Kans. 307, 186 Pacific, 493,* which is claimed to support the petitioner's position. It was there held that a telegraph message received for transmission by a telegraph company from the sender over the telephone would be subject to the provisions for limitation of liability contained in the tariffs filed by the telegraph company (which provisions were, however, held invalid). But the case is radically distinguished from the present case by the circumstance (which counsel for petitioner note at page 33 of their brief) that the Kansas statute, unlike the Interstate Commerce Act, affirmatively requires the telegraph companies to file schedules of their rates and charges for service and regulations pertinent thereto and provides that such rates and service are invalid until they are so filed, and, when formally promulgated, may not be departed from with impunity. See *Kansas General Statutes, 1915, Sections 8358, 8398, 8400, 8416.*

Upon our reading of the case, we do not find that the Kansas statute had not been complied with (as our adversaries claim in their brief); but that, however, is immaterial so long as the statute existed and forbade departures therefrom.

State ex rel. Postal Telegraph Co., 96 Kans., 297, 150 Pacific, 544.

The decision is, therefore, no more applicable than the *Hooker case* itself. And it may be noted that although the case was, by the special provisions of the Kansas statute, **requiring** the filing and posting of tariffs and forbidding departures therefrom, substantially analogous to the *Hooker case*, the Supreme Court of Kansas declined to follow the *Hooker* decision.

The Defendant Company Filed No Tariffs and Established No Rates for Cables Received by It Abroad.

As a matter of fact, even if plaintiffs could be bound by defendant's voluntary election to file a tariff or to establish a private and uncommunicated rate or regulation, the facts proven would not sustain such a defense, for there is no showing that the defendant company had established a tariff or regulation as to cables received by it abroad.

The tariffs voluntarily filed by the defendant company contained no provisions applicable to cables received by it abroad. The forms referred to in those tariffs were applicable only to cables received by it in this country. As to cables received by it in other countries, it is not shown to

have established any tariffs or any regulations, and as to them, there would therefore be, in any event, no foundation for the contention that the company had established a rate which made a limitation of liability an integral part thereof.

The Message Was Received by Defendant at Havre. The American Law Could not Operate Extra-Territorially to Create a Limitation of Liability Not Expressly Contracted For.

We have heretofore discussed this case as if it had arisen in this country and without reference to the facts that the plaintiffs are citizens of Spain, that the cable was sent from Barcelona, and that it was accepted for transmission by the defendant company at Havre. These facts present the interesting further question as to how far the rights of the present plaintiffs could be in any event controlled by the doctrine for which the defendant company contends. In other words, even if it were conceded that senders of messages in this country were bound by regulations containing limitations of liability not disclosed to them, how far could such limitations of liability be imposed by American law upon persons sending messages from abroad, *e. g.*, from Havre.

This inquiry involves two questions: (1) How far has Congress undertaken to pass a law affecting messages sent in a foreign country and received by the defendant abroad? (2) Assuming that Congress has undertaken to impose a limitation of liability, not agreed to, upon foreigners mak-

ing contracts abroad, how far, upon proper principles of the conflict of laws, has Congress authority to do so?

This Court has apparently held in the recent case of *Galveston H. & S. A. Railway Co. v. Woodbury, — U. S. —, 41 Supreme Court Reporter, 111 (December 13, 1920)* that the doctrine of the *Hooker* decision applied to a case where a passenger in Texas checked baggage over a Texas railroad although the journey of the passenger had originally begun in Canada. In that case the plaintiff's journey over the defendant railroad's line began in Texas and the defendant railroad received the baggage in Texas. In this case the journey of the message over defendant's line began at Havre and the defendant received the cable at Havre. It is not unreasonable to hold that a railroad company in Texas, receiving in Texas baggage from a passenger checking such baggage there cannot have its liability affected by the accidental fact that weeks or months before the passenger and the baggage had originated in Canada. But in the present case, that is not the situation. The cable here was received by the defendant company at Havre, and not in this country. As already noted at an earlier point in this brief, the tariffs and the regulations of the defendant company covered only cables sent from this country, and did not apply at all to cables received by the defendant company abroad; as to them the defendant company had established no tariffs.

Assuming, however, that *Galveston H. & S. A. Railway Co. v. Woodbury* decides that the Interstate Commerce Act

is intended to apply to contracts made in another country, the question arises as to how far, upon proper principles of private international law, a statute of this country can be applied to a contract made abroad. The question of conflicts does not appear to have been discussed in the *Woodbury case*. It was referred to by this Court in *Knott v. Botany Mills, 189 U. S. 69*, which is cited in the *Woodbury case*. In the *Knott case* the Court held void and unenforceable provisions of a bill of lading executed abroad which would have limited the liability of the shipper contrary to the express provisions of the Harter Act. It will be noted that that case (like the case of *The Kensington, 183 U. S. 263*, cited at page 37 of the telegraph company's brief in this Court) held invalid a limitation of liability which had been expressly contracted for abroad. In the present case, the converse situation is presented: the defendant desires to manufacture a contract for limitation of liability where none existed. It is one thing to say that a contract, valid where made, may not be enforced in a forum by the statute of which the contract is expressly forbidden. It is quite a different thing to say that the forum can create a contract where none existed by the law of the country where the agreement was made. There is no doubt that, generally, the obligations of parties are governed by the law of the place where their contracts are made. See *Liverpool Steam Company v. Phoenix Insurance Company, 129 U. S. 397*, where this Court held that:

> "A contract of affreightment made in an American port by an American shipper with an English

> steamship company doing business there, for the shipment of goods there and their carriage to and delivery in England, where the freight is payable in English currency, is an American contract and governed by American law so far as regards the effect of the stipulation exempting the company from responsibility for the negligence of its servants in the course of the voyage."

If the contract in that case was not governed by the English law, then the contract in this case may not be governed by the American law.

Counsel for the defendant telegraph company argue that it would be against the public policy of this country to permit the plaintiffs to recover in this case, relying for this proposition upon the decision in the *Kensington case*. But, as we have pointed out, in that case this Court declined to enforce a limitation of liability which had been made in Belgium and was valid there, on the ground that it was against public policy to permit the carrier to limit its liability. *Knott v. Botany Mills* was to the same effect. As just noted, the present case presents the converse question: is it against public policy for the Courts of this country to refuse to enforce a contract which does **not** provide for limitation of liability?

It by no means follows that because it is against public policy to enforce a contract for limitation of liability, that it will be against public policy to enforce a contract which provides for no limitation of liability.

We know of no public policy of this country which would require the Courts of this country to refuse to give a citizen of Spain a recovery against a telegraph company upon a contract made abroad for actual losses sustained by the breach of the defendant company.

What is there in the public policy of the United States which will be offended by making this telegraph company pay for the loss which it has caused? What is there against public policy in the contract made in Barcelona for the transmission of the message in this case without any limitation of liability?

Our public policy ordinarily is **against** limitations of liability. See the *Knott* and *Kensington cases* and the general denunciation of such limitations (subject only to specific exceptions) in U. S. Comp. Statutes, Sec. 8604a.

Counsel argues that the offence against public policy would be committed by permitting a citizen of Spain to recover upon a contract made in Spain, or France, when no unlimited contract could, as it is claimed, have been made in this country with a citizen in this country.

But it does not follow because an unlimited agreement could not have been made in this country (even if that were true, which we assume for the purpose only of this argument), that therefore it would be against the public policy of the Courts of this country to enforce such an agreement if valid where made. In *International Harvester Co. v. McAdam, 142 Wisconsin 114, 124 Northwestern 1042,*

26 L. R. A., N. S., 774, the Supreme Court of Wisconsin said:

> "The last rule that need be stated is this: A contract under the foregoing is not, necessarily, contrary to the public policy of a state merely because it could not validly have been made there; nor is it one to which comity will not be extended merely because the making of such contracts in the place of the forum is prohibited, general statements to the contrary notwithstanding. In *Milliken v. Pratt, supra*, the Court remarked substantially, even a contract expressly prohibited by the statutes of the state in which the suit is brought, if not in itself immoral (the term 'immoral' being used in the broadest sense) is not, necessarily, nor usually, deemed so invalid that the comity of the state, as administered by its Court, will refuse to entertain an action under all circumstances to enforce it. There must be something inherently bad about it, something shocking to one's sense of what is right as measured by moral standards in the judgment of the Courts, something pernicious and injurious to the public welfare. In *Greenwood on Public Policy*, at page 46, cited by counsel, the following rule is deduced from the authority cited: 'When a contract is valid under the public policy of the state where made, **it will be enforced in another state,** although the same would, by the statute laws of the latter state, be void, unless its enforcement would exhibit to the citizens of the state an example pernicious and detestable.'"

If telegraph companies were in fact **required** by the law of this country (as they are not in fact required) to make

contracts with limited liability for unrepeated messages with all senders of such messages in this country, and were forbidden (as they are not in fact) to make contracts without limitation of liability with senders of messages in this country—it would not follow that the Courts of this country should refuse on the ground of public policy to enforce a contract without limitation of liability made with a foreign shipper in a foreign country.

The argument becomes *a fortiori* when the Court recalls that not even in this country is a telegraph company forbidden to make a contract with unlimited liability. While Section 1 of Act to Regulate Commerce provides that telegraph companies "may" charge different rates for the two classes, there is nothing in that act, or in the laws of this country, which says that telegraph companies "**must**" so classify their messages or their rates. Any telegraph company, the present defendant included, could, at the time that the message involved in this case was sent, have made a contract without limitation of liability with any customer in this country, and it would have been subject to no penalty for so doing. If the defendant company, or any other company, had made such an unlimited contract with one customer and declined to make it with another, the company would have been discriminating among customers. Such discrimination will, since the Transportation Act of 1920 (but only since then) expose the telegraph company to penalties under the Interstate Commerce Act, as amended in 1920; but such discrimination would not have exposed the telegraph company to such penalties at the

time this message was sent, nor would it even now relieve the telegraph company from responsibility upon its contract as made, particularly as against the innocent customer, not aware of the discrimination.

But whatever the rights of senders of messages in this country may be, we submit that it is clear that no reason of public policy would require or justify the Courts of this country to deny redress to the present plaintiffs upon a contract made in a foreign country and valid where made, and containing in itself nothing offensive to good morals. Nothing in public policy requires or justifies the Court to impose upon these plaintiffs a contract which they never made and to deny them recovery for admitted losses sustained through the fault of the defendant.

It is immaterial that the mistake in transmission occurred between New York and New Orleans. The undertaking of the defendant company when it received this message at Havre was an entire and indivisible undertaking—to transmit the message from Havre to New Orleans. The Court's attention is called to the fact that this is not a case where the defendant company received the message in this country. The company received the message in France. The engagement of the defendant, so far as the plaintiffs are concerned, was an entire and indivisible one, to carry the message from Havre to New Orleans. The engagement cannot be divided and broken up according to the physical territory over which the message was transmitted.

The tariffs filed voluntarily by the defendant [illegible]

At page 44 of their brief in this Court counsel undertake to quote provisions of an International Telegraph Convention to which they claim the French and Spanish telegraph administrations were parties. *But there is no proof of this in the record,* and we never even heard that such provisions were supposed to exist until the filing of the opposing brief in this Court. If counsel attached any importance to these provisions it was their duty to make proof of them upon the trial and to give us an opportunity to meet such proof. And there is not even a suggestion that the provisions of such a convention, if they exist, have the force of law or that they were known or called to the attention of the plaintiffs before. No reference was made to them on the printed form on which the message was sent, which form we undertook to file in the record and which we abstained from filing only because counsel for defendants below insisted it was unnecessary in view of the agreed statement of facts. The burden on all these matters was upon the defendant.

which they had no knowledge, either actual or constructive, and which was not set out even in the tariffs which were voluntarily filed? Yet defendant contends that its liability is limited to an undisclosed amount—an amount not disclosed even in the voluntarily filed tariffs.

We believe we have shown that upon the law this case is radically different from any of those relied upon by defendant. Upon the equities the case is equally to be distinguished.

In the *Primrose case*, the Supreme Court remarked in conclusion (154 U. S., page 33):

> "In the present case the message was, and was evidently intended to be, wholly unintelligible to the telegraph company or its agents. They were not informed, by the message or otherwise, of the nature, importance, or extent of the transaction to which it related, or of the position which the plaintiff would probably occupy if the message were correctly transmitted. Mere knowledge that the plaintiff was a wool merchant, and that Mr. Toland was in his employ, had no tendency to show what the message was about. According to any understanding which the telegraph company and its agents had, or which the plaintiff could possibly have supposed that they had, of the contract between these parties, the damages which the plaintiff seeks to recover in this action, for losses upon wool purchased by Toland, were not such as could reasonably be considered, either as arising according to the usual course of things, from the supposed breach of the contract itself, or as having been in the contemplation of both parties when they made the contract, as a probable result of a breach of it."

The considerations which moved the Court in that case are not present here. The message here was in plain Eng-

lish and entirely intelligible. It carried upon its face the indication of its importance and a warning as to the serious consequences which would be caused by an error in its transmission. The figures were written out and not represented by symbols. The message on its face plainly directed the sale of cotton, and the damages which would flow from a mistake in its transmission must have been in the contemplation of the parties.

In the *Hooker case* the Court emphasized the fact that notices of limitation of liability to $100 were posted in **conspicuous** places in the baggage room *(233 U. S. at p. 108)*. In the present case not the slightest intimation of any limitation of liability or of any classification of messages into repeated and unrepeated was brought to the attention of plaintiffs, nor were any means of information brought to their attention.

TO SUM UP.

We respectfully submit to the Court that the plaintiffs are entitled to recover for the heavy loss which they have innocently sustained through the negligence of the defendant for each and all of the following reasons:

(1) The message was sent in plain English (not in cipher) from Barcelona. It was received by the defendant company at Havre.

(2) No agreement for limitation of liability was made in fact. The form upon which the message was sent contained no such provision.

(3) Plaintiffs' attention was not called to any classification of messages into repeated and unrepeated or any limitation of liability upon unrepeated messages or to the opportunity and importance of having the message repeated to protect themselves from loss.

(4) The plaintiffs cannot be affected by provisions of tariffs which the Executive Committee of the defendant company voluntarily undertook to file in 1916 (six years after the 1910 amendment to the Interstate Commerce Act) because:

(a) Such filing is not required by any law of this country.

(b) Where instruments are not required by law to be recorded, their voluntary recordation cannot put third persons on notice or affect the rights of such third persons.

(c) Telegraph companies, by the laws of this country, unlike railroad companies, are free to make such contracts as they see fit, without filing tariffs containing the provisions of such contracts.

(d) Unlike the rates of railroad companies, telegraph rates are not legally established by the filing of tariffs.

(e) Telegraph companies not being required to file tariffs, there is no prohibition against their departure from tariffs voluntarily filed.

(f) The tariffs filed by the defendant company provided for the use of forms applicable only to mes-

sages sent in this country, expressly setting out limitations of liability. These forms were not used in this case and were not applicable thereto.

(g) As to cables received abroad, no tariffs were filed and no forms prescribed for use.

(h) If persons dealing with the Western Union Telegraph Company are put on notice of tariffs filed in Washington, while persons dealing with other telegraph companies are not so put on notice, the Western Union Telegraph Company, by its own act, may put itself in a specially favored position, and uniformity of treatment is destroyed.

(5) No discrimination is shown between these foreign senders and other foreign senders, but if there were such discrimination in fact the plaintiffs were not parties thereto but were entirely ignorant thereof and their rights cannot be affected.

(6) The contract of the defendant was made abroad and valid when made. The plaintiffs, citizens of Spain, were not subject to the jurisdiction of this country. Congress has not undertaken to extend the Commerce Act to contracts made in foreign countries. If Congress had undertaken to do so, the law should still not be applied to such transaction because our law can have no extra-territorial effect. It is not against the policy of this country to permit a foreign citizen to recover from a negligent telegraph company losses actually sustained upon a contract containing no limitation of liability and valid where made.

The defendant company concedes in its argument that this Court cannot reverse the judgment in this case without maintaining the proposition that the public is bound by the *ex parte*, privately adopted and uncommunicated regulations of a telegraph company.

We earnestly submit that such a rule cannot receive the sanction of this Court and that the judgments of the lower Courts should be affirmed.

Respectfully submitted,

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